Supreme Court, U.S.
FILED
MAY 5 1993
OFFICE OF THE CLERK

No. 92-1523

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

BANK ONE, TEXAS, N.A., AND BANC ONE CORPORATION,
Petitioners,

vs.

WICHITA FALLS OFFICE ASSOCIATES,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONERS' REPLY BRIEF

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Petitioners Bank One, Texas, N.A. and Banc One Corporation submit the following Reply to Respondent Wichita Falls Office Associates' "Brief In Opposition To Petition For A Writ Of Certiorari."

RESPONSE TO RESPONDENT'S "STATEMENT OF THE CASE"

Petitioners reiterate that Respondent made no request for the discovery it now claims to have been critical to its ability to defeat

summary judgment until *eight months after it responded on the merits to Petitioners' motion for summary judgment.*[1] Most importantly, Respondent never once complained *in the district court* that it required the additional discovery to defeat Petitioners' motion for summary judgment.

Respondent does not dispute any of the factual assertions contained in the Petition for Writ of Certiorari. In its brief in opposition, however, Respondent claims that Petitioners "concede" that Respondent informed the district court that additional discovery was required with respect to issues raised by the motion for summary judgment. (*Resp.*, p.1). This is simply not the case. As described in the Petition and in text of the district court's opinion, the statements made by Respondent in its filings with the district court actually caused that court to conclude that Respondent required no additional discovery to respond to the motion for summary judgment. (*Pet.*, p.7-8; E-2). The record clearly shows that Respondent never requested additional time to secure discovery "essential" to justify its opposition to the motion.

It is revealing that the opinion of the Court of Appeals makes no reference to any requests by Respondent for additional time to conduct discovery relating to the summary judgment issues. Respondent's only requests relating to discovery were for extensions of the discovery cutoff date imposed by the district court pursuant to Rule 16 of the Federal Rules of Civil Procedure.[2] These unopposed requests for extensions had nothing to do with the pending motion for summary judgment. Indeed,

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[1] There was no stay prohibiting Respondent from securing discovery until discovery was stayed in response to Petitioners' motion for protective order. Petitioners filed their motion for protective order in response to a "barrage" of discovery first served by Respondent more than eight months after Petitioners' motion for summary judgment was ripe for disposition.

[2] In relying upon these requests for extensions of the discovery cutoff deadline, Respondent implies that summary judgment should never be

Petitioners joined in the requested extensions of the discovery cutoff date precisely because they did not wish the district court's scheduling deadlines to place the parties in a posture which would compel them to engage in expensive and unnecessary discovery (and motion practice) before the district court had ruled on Petitioners' meritorious motion for summary judgment. Thus, Respondent's assertion that there is significance to be derived from the fact that the referenced extensions of the discovery cutoff deadline were requested by all of the parties, including Petitioners, fails to acknowledge Petitioners' motive for joining in the requests. (*Resp.*, p.2).

Respondent's reliance on the ruling of the Magistrate Judge is inexcusable. Respondent *never* argued to the Magistrate Judge that it required the additional discovery to rebut Petitioners' motion for summary judgment. (*Pet.*, p.9, n.6). Respondent urged the Magistrate to allow discovery to proceed only because the case was set for trial and the discovery cutoff date was fast approaching — not because of any asserted need for additional evidence to meet the summary judgment threat. The Magistrate's ruling reflects nothing more than his unwillingness to interfere with the district court's scheduling order. (*Pet.*, p.F-1).

ARGUMENT

I.

THERE IS A CONFLICT AMONG THE CIRCUITS AS TO THE PROPER CONSTRUCTION OF RULE 56(f)

Challenging the conclusion reached by several of the Courts of Appeals, Respondent claims that there is no conflict among the circuits with respect to Rule 56(f). Respondent arrives at its conclusion by drawing an alleged distinction between what it refers to as "substantive" compliance with Rule 56(f) and what it characterizes as the "ritualistic" compliance urged by Petitioners.

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granted until the discovery deadline has passed. In Petitioners' view, such a rule defeats the purpose of the summary judgment procedure.

(Resp., p.4-5). According to Respondent, no circuit would uphold a summary judgment merely because the reasons supporting the request for a delay in the disposition of the motion were not presented in the form of a Rule 56(f) affidavit.[3] The cases cited in the Petition refute this contention. *See, e.g., Town Sound and Custom Tops v. Chrysler Motors,* 959 F.2d 468, 494, n.39 (3rd Cir. 1992) (plaintiffs requested but did not obtain information conceded to be "relevant"; however, "it was incumbent on them to file a Rule 56(f) affidavit" if they believed the information was necessary to defeat the motion for summary judgment); *Klepper v. First American Bank,* 916 F.2d 337, 343 (6th Cir. 1990) (court states that "normally" appellant "might have prevailed" on challenge to summary judgment where district court gave non-movant "no opportunity to engage in discovery" prior to granting summary judgment; however, judgment is affirmed because non-movant failed to meet his "burden" under 56(f) by "not presenting any affidavit as required under Rule 56(f)."); *Avia Group Intern., Inc. v. L.A. Gear California,* 853 F.2d 1557 (Fed. Cir. 1988) (had non-movant filed an affidavit, "there would be an appealable discovery issue. Having failed to do so, there is none.")[4]

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[3] Of course, there is much more here than Respondent's failure to submit an affidavit. Respondent made no attempt to secure a delay of the summary judgment proceedings, and actually made affirmative representations unequivocally indicating that it did not require additional time to secure discovery. Only on appeal to the Fifth Circuit did Respondent raise any question as to the sufficiency of its opportunity to take discovery for the purpose of meeting Petitioners' motion for summary judgment. Thus, whatever acts Respondent believes might be adequate to satisfy its test of "substantive" compliance with Rule 56(f), those acts were certainly not taken in this case.

[4] Respondent has taken some liberties with the relevant authorities. It is true that the Third Circuit's decision in *Sames v. Gable,* 732 F.2d 49 (3rd Cir. 1984) suggests that Circuit's willingness to ignore the requirements of Rule 56(f). It is equally true that the Third Circuit subsequently relegated *Sames* to the status of an aberration in an

Respondent's position is based on a faulty premise — that courts can and should excuse a non-movant's failure to comply with Rule 56(f) because that provision was "intended to protect — and certainly not hurt" non-movants. *(Resp., p.5)*. This is simply not true. As described in the Petition, Rule 56(f) protects *movants* as well as non-movants. (*Pet.*, p. 24-28). First, the requirement that an affidavit be filed compels the non-movant to support its asserted need for additional time with sworn statements setting forth the specifics of how the additional time will allow it to secure the evidence "essential" to avoid summary judgment. Second, it ensures that before the district court agrees to prejudice the movant by deliberately delaying its ruling on the motion, it has determined on the basis of the non-movant's sworn statements that the latter has a serious need for the additional time (i.e. that it has not been dilatory) and that the evidence it seeks is "essential" to defeat the motion.[5]

Third, the non-movant's 56(f) affidavit provides the district court with the reliable information that court needs to ensure that any additional discovery it may allow is focused solely on the development of potential genuine issues of material fact. Thus, even if a continuance is granted, the district court can utilize the information in the affidavit to protect the moving party against the

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otherwise consistent line of cases requiring strict compliance with Rule 56(f). *Radich v. Good,* 886 F.2d 1391, 1393 (3rd Cir. 1989). Thus, it is now clear that the factors that led to the result in *Sames* will only be relevant "when a proper Rule 56(f) affidavit is filed." *Contractors Ass'n of E.Pa. v. Philadelphia,* 945 F.2d 1260, 1267 (3rd Cir. 1991). Indeed, the Third Circuit's decision in *Lunderstadt v. Colafella,* 885 F.2d 66 (3rd Cir. 1989), contains an express warning reminding members of the bar of the *"requirement"* that an affidavit be filed in support of Rule 56(f) relief. *Id.* at 70-71 (emphasis in original).

[5] The use of the word "essential" in Rule 56(f) obviously requires a showing that the discovery is aimed at securing pivotal information, and not information that would simply be nice to have.

time and expense that would otherwise be incurred in responding to discovery requests that have no bearing on any issue relevant to the motion.[6]

Finally, the 56(f) affidavit provides the record that may later justify the fee and cost shifting mandated by Rule 56(g). Indeed, the filing of the affidavit is an express prerequisite to the non-movant's receiving protection under Rule 56(g). (*Pet.*, p. 28-29).

Thus, even assuming, *arguendo,* that the plain language of Rule 56(f) can be ignored in order to accommodate Respondent's "substantive" compliance standard (and it cannot be), that standard would still transgress the policies that 56(f) seeks to promote. The fact is that Rule 56(f) strikes a balance between the competing interests of movants and non-movants. While its provisions "protect" non-movants by providing a means through which the latter may "keep open the doors of discovery," they likewise protect movants by ensuring that any delay for the benefit of the non-movant is supported by the non-movant's showing that the delay is truly necessary to promote the interests of justice. When the non-movant fails to make such a showing, relief is appropriately denied. *See, e.g., Jarvis v. Nobel/Sysco Food Services Co.,* 985 F.2d 1419, 1422-23 (10th Cir. 1993) (upholding district court's conclusion that affidavit did not support relief under Rule 56(f)).

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[6] The Rule 56(f) affidavit also facilitates appellate review of the propriety of the district court's ruling on the non-movant's request for 56(f) relief.

II.

THE FACT THAT THE COURT OF APPEALS REMANDED THE CASE FOR FURTHER PROCEEDINGS SHOULD HAVE NO BEARING ON THIS COURT'S DECISION TO GRANT OR DENY CERTIORARI

The fact that the Fifth Circuit reversed the summary judgment and remanded for further proceedings should not impact this Court's consideration of the merits of the Petition. In the landmark case of *Celotex v. Catrett,* this Court granted certiorari to review a judgment of the Court of Appeals that reversed the district court's grant of summary judgment and remanded the case for further proceedings. *Catrett v. Johns-Manville Sales Corp.,* 756 F.2d 181, 187 (D.C. Cir. 1985), *rev'd, Celotex v. Catrett,* 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Indeed, the reversal of a summary judgment will almost always involve a remand. Thus, the Court has indicated that it will not decline review in a summary judgment case simply because the case has been remanded to the district court.[7]

Petitioners are at a loss to understand Respondent's argument that the Fifth Circuit "could simply have affirmed" if it believed that there were no genuine issues of material fact. (*Resp.,* p.8). Conversely, the Fifth Circuit could simply have reversed without relying on the discovery issue if it truly believed that the record revealed a single genuine issue of material fact. Instead, it chose to reverse only because it concluded that the district court had prematurely terminated discovery. If anything, the Fifth Circuit's rationale strongly suggests that it *did* conclude that the record

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[7] Acceptance of Respondent's argument that the "interlocutory" nature of the Fifth Circuit's ruling renders this case an inappropriate candidate for certiorari would mean that every judgment of a Court of Appeals reversing and remanding a summary judgment would escape this Court's scrutiny. Petitioners respectfully submit that no jurisprudential interest is served by application of such a blanket restriction.

before it presented no genuine issues of material fact and that, but for the discovery issue, it would have affirmed.

Respondent presumes that this Court will remand the case to the Fifth Circuit for further consideration. (*Resp.*, p.8) For the reasons described in Point IV, Pages 30-31 of their Petition, Petitioners believe that the district court's analysis clearly and unequivocally explains why Petitioners are entitled to judgment as a matter of law. The district court's analysis consisted almost exclusively of its exposition and application of the governing principles of Texas law, and was not based on the inadequacy of Respondent's factual showing. Contrary to Respondent's suggestion, the Court of Appeals never challenged the correctness of the district court's legal analysis. Thus, this Court may very well conclude that a remand to the Court of Appeals is unnecessary, and render judgment in favor of Petitioners.

Finally, the principle involved in this case is an important one. The sheer volume of reported cases at both the district court and court of appeals levels demonstrates that Rule 56(f) issues arise on a daily basis throughout the federal system. Given the degree of conflict and confusion apparent from any fair comparison of the cases, this Court's guidance in this area is needed. Furthermore, even if the issue was not one that regularly confronted the lower federal courts, the Rule's central role in modern federal summary judgment practice would be sufficient in itself to merit this Court's attention.

CONCLUSION

For all the foregoing reasons, and for the reasons expressed in their Petition, Petitioners Bank One, Texas, N.A. and Banc One Corporation respectfully request that this Court grant their Petition for Writ of Certiorari, and reverse the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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